

SUPREME COURT OF NOVA SCOTIA

Citation: *CIBC Mortgages Inc. v. Samson-Hahn*, 2015 NSSC 149

Date: 2015-05-25

Docket: Ken No. 418326

Registry: Kentville

Between:

CIBC Mortgages Inc., a body corporate

Plaintiff

v.

Doffy Samson-Hahn

Respondent

Judge: The Honourable Justice Gregory M. Warner

Heard: March 12, 2015, in Kentville, Nova Scotia

Counsel: Plamen Petkov, for the applicant
Respondent not present, not represented

By the Court:

[1] This decision relates to the Mortgagee/Plaintiff's claim for protective disbursements incurred by its property manager in respect of a foreclosure. This decision is intended to provide guidance in respect to claims for protective disbursements pursuant to *CPR 72.13(2)* and Practice Memorandum No. 1 (Foreclosure Procedures), ss. 3.3, 3.5, 3.7 and 3.8.

Facts

[2] On April 5, 2006, the Defendant gave a conventional mortgage to the Plaintiff Mortgagee on property at Bayview, Digby County, Nova Scotia in exchange for \$70,000.00 and her promise to repay the Plaintiff in blended monthly payments. As of April 2013, the Defendant had stopped paying the mortgage and defaulted under the terms of the mortgage, entitling the Plaintiff to commence a foreclosure action.

[3] The foreclosure action was commenced in August 2013. At that time, the Mortgagee became aware that the mortgaged property was occupied by tenants. Process servers were unable to find the Defendant either in the Digby County Nova Scotia area or at her last known address in Burlington, Ontario.

[4] An order for substituted service was issued on January 29, 2014, resulting in substituted service as of February 5, 2014. No defence was filed. An *ex parte* Order for Foreclosure, Sale and Possession was issued March 18, 2014 and amended June 13, 2014.

[5] The property was sold at a public auction by a court approved auctioneer on June 20, 2014 to a third party, unrelated to the Plaintiff, for more than the outstanding mortgage debt and auctioneer's fee.

[6] On September 22, 2014, the Mortgagee applied *ex parte* to:

- a) confirm the foreclosure report and sale;
- b) tax the Plaintiff's solicitor's costs; and,
- c) approve protective disbursements claimed and fix the amount of the surplus.

[7] In support of the claim for protective disbursements of \$5,336.56, the Mortgagee filed the affidavit of Diana Dickson, a Relationship Officer of the Plaintiff of Toronto, Ontario. The affidavit reads:

3. The Property Manager attended the property on July 11, 2013 for an occupancy check at a cost of \$40.25 and found the property to be occupied and left a twenty-four hour notice for call back. On July 23, 2013 the property manager received a call from the previous tenant occupier advising that the property was now vacant. On July 23, 2014 the property manager re-attended at the property and proceeded to secure and the property at a cost of \$419.75 inclusive of HST. This consisted of installing new locks, light cleaning

at securing, checking all windows and doors to ensure they are all secured, checking the power, changing of utilities, and completion of the security report.

The property manager attended at the property on three separate occasions to provide supervised access to real estate agents who were showing the property (in attempts to sell the property) on behalf of the Defendant, at a cost of \$214.00 inclusive of HST.

On January 16, 2014 an electrician attended at the property to complete necessary electrical repairs at a cost of \$1,345.50 inclusive of HST. The repairs included the supply and installation of two baseboard heaters with thermostats in the basement utility room and two wall fan force heaters with built-thermostats in the basement bathroom and hallway to prevent freeze ups in the basement of the property. This was necessary because the heating sources (oil furnace and tank and a wood stove) at the property had been removed before the security of the property.

The property manager rechecked the property on a bi-weekly basis at a cost of \$40.25 per check, inclusive of HST, to ensure that the property does not suffer damage that is not timely detected and repaired. This consisted of the inspector entering the property to check that all windows and doors were still locked, and a general overall inspection of the property to prevent any damage.

The lawn was cut as needed at a cost of \$43.70 per mowing, inclusive of HST. The driveway was cleared of snow as needed at a cost of \$43.70 per plowing, inclusive of HST. The snow had to be cleared to allow emergency vehicles to the property should there be a fire or another safety issue and to allow real estate agent access for property showings. The utilities were paid as necessary.

4. Attached as Exhibit "C" is the securing report prepared by Veranova Properties Ltd., as well as accompanying pictures taken at the time of securing the property. I am advised by Darcy Hiltz, and do verily believe the information in the securing report and pictures to be true. As indicated in the securing report, it appeared that the heating system in the home had been removed, which included the removal of oil tank and furnace and wood stove.

[8] The Court was prepared to confirm the foreclosure report and sale, and approve (tax) their solicitor's fees, but required better evidence respecting some of the claimed protective disbursements.

[9] On October 6, 2014, the Court wrote Plaintiff's counsel with questions about the "evidence" supporting the claim for the protective disbursements. The memo included the following:

I do not understand the explanation of the increase in the electrical repairs invoice of DKT. It does not contain evidence of the expense and why it was necessary and reasonable. The DKT invoice was for \$1,060.00 plus HST of \$159.00 totaling \$1,219.00. The affidavit does not indicate what happened to the 4 heaters installed.

My question regarding who provided home inspections, grass cutting, snow removal, access to realtors is not answered by the Veranova invoices (which were already attached to Ms. Dickson's Affidavit).

Veranova is a North York Ontario Company. I do not know whether it has employees in each location across Nova Scotia (or Canada) where it acts as a property manager for CIBC foreclosed properties (and if so, how far from the foreclosed property they are located).

Or alternatively do they hire on an agency basis individuals or business corporations as well as agents (and where they are located in relation to the foreclosed properties)?

If the persons who mow, plow, inspect etc. are employees of Veranova I want to know their hourly rate and where they are located in relation to the foreclosed property. If they are hired for other than being employees – i.e. agents or contractors, I want to know their location(s) and their invoices.

The Court has not questioned these charges in the past “in faith” but the Rules require evidence and I have no idea how CIBC's property manager provides the services and therefore whether they are reasonable.

It may be appropriate to receive oral submissions in Chambers on the extent of the evidence and whether the expenses are reasonable. You can arrange a Chambers appearance at your convenience.

[10] On February 11, 2015, the Plaintiff filed the affidavit of Darcy Hiltz, obtained a chambers' date to hear its motion and gave notice to the Defendant (by substituted service) of the chambers' date. Ms. Hiltz's affidavit reads:

2. Veranova was retained by the Plaintiff to manage and maintain the property known as 167 Bayview Shore Road, Bayview, Digby County, Nova Scotia, which consists of a dwelling house and lands (collectively the “Property”).

3. As a Property Management Coordinator, I am responsible to have the Property secured, maintained and cleaned until it is sold to a third party or until Veranova's retention is terminated.

4. Veranova retains General Maintenance Contractors through this province that performs general protective maintenance at various properties which are being managed and maintained by Veranova.

5. The General Maintenance Contractors are assigned to perform general protective maintenance at properties within geographical areas in which they reside.

6. With regards to the mark up of \$126.50 for the electrical repairs, the mark up is compensation for management of the particular repair, which include but are not limited to: estimate sourcing, scope of work confirmation, job completion quality control, invoice payment as well as field inspector and administrator's time. The above expense was

necessary because management of the third party contractor is critical in order for the repairs to be carried out timely, cost effectively, and properly.

7. I assigned Shawn B., who covers a service area as a property inspector of approximately 350 kilometers, to perform general protective maintenance at the Property.

8. Shawn B. billed Veranova at a rate of \$30.00 per hour.

9. Shawn B. was assigned inspections from an internal computer system maintained by Veranova.

10. I make this Affidavit in support of the Plaintiff's Motion for an Order Confirming Foreclosure Sale, Taxing Plaintiff's Costs, and Confirming Amount of the Surplus Funds.

[11] The Defendant did not appear at the chambers hearing on March 12, 2015. Ms. Hiltz was questioned by the Court under oath respecting her affidavit, which questions and answers produced evidence to the effect that their procedures in this case conform to their practice generally in respect of the services they provide to mortgagees in foreclosure proceedings.

[12] At the beginning of her evidence, she corrected two errors in her affidavit: first, she is of Dartmouth, Nova Scotia not Toronto, Ontario; second, in para. 8, the reference to an hourly rate of \$30.00 is not what their subcontractor/inspector invoices the property manager, but what the property manager bills the mortgagee.

[13] Ms. Hiltz was familiar with the affidavit sworn by Ms. Dickson on behalf of the Plaintiff in support of the claim for protective disbursements and the attached exhibits dealing with those disbursements. They were her responsibility.

[14] Veranova Properties Limited is a national company, with a regional office in Dartmouth, Nova Scotia. Its employees are the administrative and accounting staff situate in Dartmouth. The only business of the Dartmouth regional office is mortgage foreclosure property management; that is, securing, cleaning, maintaining, repairing and making saleable those properties.

[15] All of the work carried out at the properties is completed by individuals (inspectors) who enter into contracts with Veranova; they are not employees of Veranova. These contracted inspectors have areas within Nova Scotia that they look after for Veranova. Not all of the areas are of the same size. Sometimes the areas are such that the independent contractors may travel as much as three hours when asked to attend on a property by Veranova.

[16] These inspectors carry out all of the inspections, cleaning, maintenance, grass mowing and snow cleaning functions. They also carry out the general repairs required for the property. Other repairs, which involve more specialized skills or attention, such as the electrical work in this case, are contracted out separately to local contractors.

[17] The contracted inspector is not on Veranova's payroll. The contractor is paid on the basis of invoices submitted by the contractor to Veranova on a weekly basis. Once a week, he submits

invoices for each property on which he has performed work or service. Veranova does not deduct CPP, workers' compensation or income tax deductions.

[18] Veranova does not provide to its clients, nor to the Court, copies of the actual contracted inspector invoices. Some contracted inspectors have their own people assist them (for example, frequently in respect of cleaning and removing stuff in and on a property). The contractors are responsible for any helpers that they may hire.

[19] Ms. Hiltz declined to reveal the actual amounts contracted inspectors are permitted to charge for different services to Veranova. Sometimes they charge on a time basis and sometimes on a per item basis. For occupancy checks, inspections, lawn mowing or snow removal, they invoice Veranova on a per item basis according to a set fee. Cleaning properties, carrying out repairs and attending to providing supervised access to realtors and others are not invoiced on a per item basis but on a time basis.

[20] Ms. Hiltz was unsure of the amount of per item fee invoiced by contracted inspectors to Veranova and how these related to the amount of the per item fee charged by Veranova to the mortgagee, as set out in the client's summary to the Court. For example, she could not relate the \$35.00 plus HST fee for an occupancy check or inspection, or the \$38.00 plus HST fee for lawn care and snow removal, to what the contractor invoices Veranova.

[21] Ms. Hiltz was asked about the markup in the amount of \$126.50 between DKT's Electrical invoice to Veranova of July 22, 2014, and Veranova's invoice to the Plaintiff for the supply and installation of electric heaters, completed on January 16, 2014. Ms. Hiltz states that the difference reflected Veranova's work in obtaining one or two estimates for the work, obtaining approval of the estimates by the client, and supervising the work by the contractor. Usually one or two estimates are obtained for any repairs not carried out by their own contracted inspectors.

[22] In this case, the only documents provided to the Court are DKT's one-line invoice dated July 22, 2014, six months after the work was completed, and Veranova's three-line invoice to the mortgagee. Ms. Hiltz advised that Veranova would have in its file an estimate DKT provided, before the work was carried out, and Veranova's estimate (including markup) that would have been provided to the client for its approval before the work was done. The client is not provided with any estimates given by the contractors to the property manager.

The Law

[23] The approval of protective disbursements is not expressly dealt with in the rule concerning surpluses. *CPR 72.14(4)* reads: "A judge may take accounts, make inquiries, tax costs, and order distribution of the surplus."

[24] Claims for protective disbursements arise most often in motions for assessment of a deficiency (*CPR 72.12*). *CPR 72.13* reads in part:

(1) A judge may calculate the deficiency by subtracting one of the following amounts from the outstanding principal, mortgage interest, judgment interest, reasonable charges authorized by the mortgage instrument, and costs:

(a) the balance of the sale price paid to the mortgagee, if the property is sold by public auction or approved agreement to a person other than the Mortgagee;

(b) [deleted, not relevant]

(c) [deleted, not relevant]

(d) [deleted, not relevant]

(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.
[Court's emphasis]

[25] Practice Memorandum No. 1 "Foreclosure Procedures", at Part III, "Motions for Deficiency Judgment or Distribution of Surplus", reads in part:

3.3 General Provisions

(a) The originals or true copies of all invoices or receipts from all independent suppliers of goods, materials, and services relating to the claim must be filed with the court for inspection. Where a property manager has been retained whose own personnel have provided goods, materials, and services in the management of the property under foreclosure, verification must be provided by affidavit stating who performed the work, their trade qualifications (if any), their hours of work, and hourly rates charged.

(b) The amount will be determined by adjusting the mortgage debt as settled in the Order for Foreclosure, Sale, and Possession. In addition to the amounts evidenced by the order and the Sheriff's Report, the court will take into account interest to the date of default judgment, judgment interest after that date, taxation of costs, taxation of disbursements and allowable protective disbursements after the date the Notice of Action except those included in the amount settled by the Order for Foreclosure, Sale, and Possession. Particulars of protective disbursements and taxable disbursements are to be set out in an affidavit and must include sufficient detail to show work done or material provided, the necessity of work or material, the necessity of other kinds of charges and

the recoverability of the charges.

[Court's emphasis]

...

3.5 Claim for Deficiency

(a) Motions for a deficiency judgment must be filed within six months of the sheriff's sale on ten days' notice. A deficiency occurs where "the amount realized is insufficient to pay the amount found to be due to a plaintiff for principal, interest and disbursements as authorized by the mortgage instruments and costs". Where the mortgagor has so contracted and the mortgagee has so pled, the mortgagee has the right "to expend moneys to protect the property and to recover the same on a claim on the covenants so long as the expenditures were properly and reasonably incurred to realize the best price possible so as to minimize a claim for a deficiency against the mortgagor." (*Nova Scotia Savings and Loan Co. v. MacKay and MacCulloch* (1980), 41 N.S.R. (2d) 432 (S.C.-T.D.) at para. 16 quoted with approval in *Royal Bank of Canada v. Marjen Investments Ltd.* (1998), 164 N.S.R. (2d) 293 (C.A.) at para. 59.) The court will allow only those items which: (a) are authorized by the mortgage; (b) were necessarily expended for the purpose of preserving and protecting the property; and (c) are demonstrated by evidence to have been necessary and reasonable, the specifics of which are set out in an affidavit of the Mortgagee or its officer.

...

3.7 Commentary on Protective Disbursements

A claim for a protective disbursement must be supported by evidence and explained in a chambers memorandum. A claim for a protective disbursement will not be allowed unless the mortgage provides for both the payment and its inclusion in the mortgage debt. The memorandum should refer to the term relied upon and if its meaning is in any way open to interpretation, the memorandum should provide a submission for interpretation mindful that the term is part of an adhesion contract. The affidavit on behalf of the Mortgagee must contain sufficient detail so the court can ascertain whether the disbursement is within the wording of the mortgage, whether the expenditure was necessary and whether the amount was reasonable. The following comments describe experiences of chambers judges in recent years, with the intention that this may provide some guidance as to claims that will likely be unsuccessful, claims that will require sound explanation and claims the amount of which will be closely scrutinized.

(a) Administrative Fees – Fees charged for efforts made by employees, such as on account of a missed payment or an NSF cheque or to inspect the mortgaged premises, have generally been rejected.

(b) Credit Reports, Trace Searches and Demand Letters – The cost of these has generally been refused. Disbursements for reports or searches may be taxable if they were incurred to effect service or used in a motion for substituted service.

(c) Appraisals and Surveys – Ordinarily one appraisal is allowed as a taxable disbursement on a deficiency judgment motion. Generally, judges have refused to allow the cost of appraisals or surveys obtained for the Mortgagee’s own purposes.

(d) House Sitting – Plaintiffs may expect close scrutiny of the cost and necessity, including frequency, of charges for mowing, snow removal, cleaning, maintenance, repairs and inspection. Commissions or flat fees, such as “weekly inspection” or “maintenance fee”, are not generally allowed unless the cost is, by evidence, tied to specific services and justified. [Court’s emphasis]

(e) Insurance – Premiums for policies insuring against fire and similar perils will only be allowed upon proof that the mortgagor’s policy was terminated. The mortgagee should also file with the court an undertaking that the balance will be credited against the mortgage debt if the policy is cancelled before its usual expiry. Premiums for liability policies are generally not allowed.

(f) Costs Associated with Environmental Concerns – In order for the cost of an environmental assessment or any remedial work to be allowed, there must be evidence establishing the need for the assessment or remedial work. The need to replace an oil tank must be proved before the cost of replacing the tank is allowed.

(g) Improvements – The need for and cost of making improvements, such as replacing a chimney or furnace or rebuilding a deck, will be closely scrutinized. There will be a presumption that an improvement made after appraisal increases the property’s value, and its cost will not usually be included in a deficiency judgment.

(h) Real Estate Commission – Some mortgagees receive a reduction in the amount of the real estate commission charged on sale of a property. The mortgagor is to receive the benefit of any such reduction. A mortgagee is only entitled to receive credit for the amount of the real estate commission actually paid.

3.8 Documentation

The documentation required on all motions is:

...

(b) Affidavit by or on behalf of the Mortgagee – The affidavit is to be of the mortgagee, an officer or employee of the mortgagee or the management company engaged by the mortgagee. It is not to be an affidavit of their solicitor. There will be attached to this affidavit as exhibits all documents necessary to establish each of the claims being made by the Plaintiff. These shall include the following:

...

(2) a listing of any protective disbursements claimed which were not already included in the Order of Foreclosure, Sale, and Possession and which are otherwise permitted by this Memorandum. The list shall itemize each disbursement by category and show the total amount claimed in each category. Information must be provided to demonstrate the necessity for incurring the protective disbursements, and;

...

Analysis

[26] In this case, the mortgage included the following relevant clauses respecting the claim:

8.6 Repairs

You must keep your property in good condition and in a good state of repair.

You must carry out all necessary repairs and you must not do anything, or let anyone else do anything, that lowers the value of your property.

You must also comply with every present and future law, by-law, ordinance, regulation and order that affects the condition, repair, use or occupation of your property.

You authorize us to enter your property at all reasonable times to inspect and repair your property. By entering your property to inspect it or do repairs, we are not becoming a Mortgagee in possession of your property.

We can made any repairs we think are necessary if, in our opinion:

- You do not keep your property in good condition and in a good state of repair;
- You do not carry out all necessary repairs, or you do anything, or you allow anything to happen, that lowers the value of your property; or
- You do not comply with all present and future laws, by-laws, ordinances, regulations and orders that affect the condition, repair, use or occupation of your property.

You are responsible for the costs of any repairs and any inspections. You must pay us these costs immediately. If you do not pay these costs immediately, we may declare that you are in default on your mortgage, or add the costs of the loan amount, or do both.

...

8.10 Possession of your property on default

You certify to us that if you fail to meet any of your obligations under the mortgage, we may take possession of your property without any encumbrances or interference.

...

10. Our rights

...

10.3 Enforcing our rights

If you do not make one or more payments when required or if you do not meet one or more of your obligations under the mortgage, we may enforce our rights by taking certain actions. We have the right to take one or more of these actions at the same time or in any order we choose. These actions include:

- Enter your property. We may enter your property at any time, without your permission, and make any necessary arrangements to inspect, collect rent, manage, repair or complete construction. We may lease or sell your property without actually taking possession of it. We will not be considered to be a Mortgagee in possession of your property unless we actually take possession of it. While in possession, we will only be accountable for money actually received. We may take possession of your property without any encumbrances or interference.

- Appoint a receiver. We can appoint in writing a receiver (including a receiver or manager) to collect any income from your property. The receiver will be your agent, not ours, and you alone will be responsible for anything the receiver does or fails to do. We are not accountable for any money received by the receiver except for money that we actually receive. The receiver may use every available remedy or action that we have under the mortgage to collect the income from your property, take possession of part or all of your property, or to manage your property and keep it in good condition. From the income collected, the receiver will pay the following:

- All rents, taxes, insurance premiums and other expenses required to keep your property in good condition;
 - Its own commission as receiver;
 - All amounts required to keep any encumbrance ranking in priority to the mortgage in good standing;
 - Interest owing under the mortgage; and
 - All or part of the loan amount, whether it is due or not.

- Sue you. We may take any action that is necessary to collect the loan amount.

- Lease your property or collect rents. If you are in default on the mortgage for more than 15 days, we may enter and lease your property after giving you 15 days notice. . . . We will only be accountable for the money remaining after payment of all costs and expenses when we actually receive it. If the money remaining, after paying all costs and expenses, does not pay the loan amount in full, you must pay us the difference.

- Power of sale. We may exercise the power of sale and all other powers conferred to us by the applicable laws of the province where your property is located. . . . We may apply the money remaining from any sale, after paying all costs and expenses, to reduce

any part of the loan amount. We will only be responsible for the money remaining after we pay all costs and expenses when we actually receive it. If the money remaining, after paying all costs and expenses, does not pay the loan amount in full, you must pay us the difference.

- ...

- Cure any defaults. We can cure any defaults under the mortgage and take any other steps or proceedings against you that are allowed by the laws of the province where your property is located and the laws of Canada.

If we take possession of your property to enforce your rights, you will not interfere with our possession. You also will not interfere with the possession of your property by any receiver we appoint, nor with the possession of your property by any person we have leased or sold your property to. You will not make any claim against any person to whom your property has been leased or sold.

You must pay all of our expenses related to our enforcing our rights. You must pay these amounts immediately when we ask for them. These expenses may include legal fees. Our legal fees will be charged on a “solicitor and client” basis. You must also pay all other costs we have to pay to protect our interests and to enforce any of our rights under the mortgage, as well as a reasonable allowance for the time and services of our employees and CIBC employees.

[27] The schedule of protective disbursements claimed by the Plaintiff against the surplus consist of 30 items. The items include:

i. Six items consisted of electricity (Nova Scotia Power) charges between August 26, 2013 and June 18, 2014 totalling \$2,097.12. The six invoices from Nova Scotia Power to the property manager are attached to Ms. Dickson’s affidavit. This claim accords with the court’s rules in respect of proving disbursements. The actual invoices are attached and proven. The length of time the claim is made for - August 2013 to June 2014, is reasonable because of the lengthy delays at attempting to locate and serve the Defendant both in Nova Scotia and Ontario, which efforts were unsuccessful and lead to an order for substituted service.

ii. One item was for \$1,345.50 (\$1,170.00 plus HST), invoiced by the property manager to the Plaintiff on an unknown date for work and materials completed on January 16, 2014, to “supply and install two baseboard heaters with thermostats in basement, utility room and two wall fan force heaters with built-in thermostats in basement bathroom and hallway. All work to be completed to code. Clean up of site. One man at 15.8 hours at \$25.00 per hour plus \$780.00 materials.” Attached to the property manager’s invoice to the Plaintiff is the one-line invoice from DKT Turbo Electrical Limited of Weymouth, Nova Scotia dated July 22, 2014, to “put in heaters” for \$1,060.00 plus HST (\$1,219.00).

iii. Six items were for “attended to the property to cut and trim grass”. The only documentary evidence is the property managers’ one-line invoice to the Plaintiff described

above, each for \$38.00 plus HST on July 25, August 2, August 22, September 5, September 19 and October 3, 2013.

iv. Four items were for “snow clearing and salting”, each for \$38.00 plus HST on December 20, 2013, January 6, 24 and 31, 2014. The only documentary evidence is the property managers’ one-line invoice to the Plaintiff.

v. Five items were for “inspect house”, each for \$35.00 plus HST on October 15 and 29, November 12 and 26, 2013 and February 28, 2014. The only documentary evidence are the two-word “inspect house” invoices from the property manager to the Plaintiff. Other listed “inspection” invoices that occurred on or close to the date of other services were crossed out and not claimed.

vi. One item was for an “occupancy check” on July 11, 2013, in the amount of \$35.00 plus HST. The only evidence is the property managers’ two-word, one-line invoice to the Plaintiff.

vii. Four items relate to the securing of the property and installing of locks on the property on July 23, 2013. The only evidence are the four one-line invoices from the property manager to the Plaintiff as follows: “securing report”, \$85.00 plus HST; “installing padlock-1x”, \$20.00 plus HST; “installed handle locks-2x”, \$130.00 plus HST; and, “install deadbolts-2x”, \$230.00 plus HST.

viii. Three items for providing access to the property. The only evidence are three invoices from the property manager to the Plaintiff as follows:

1. August 13, 2013, “attended at premises, agent cancelled appointment last minute, inspector on route, 3 hours at \$25.00”, \$75.00 plus HST;
2. August 22, 2013, “open for REA supervise access attended at premises”, \$105.00 plus HST; and,
3. December 6, 2013, “open property for showing, attended at premises”, \$100.00 plus HST.

[28] *CPR 72.13(2)* requires the mortgagee, who claims that an expenditure is a reasonable charge authorized by the mortgage, to prove:

- i. the term of the mortgage authorizing the expenditure;
- ii. its necessity for preserving or protecting the property; and,
- iii. the reasonableness of the amount, both in its fairness for the work done or materials supplied, as well as its value for protecting the property.

[29] The Practice Memorandum, in particular s. 3.3, sets out how these prerequisites are approved. The case law cited in the Practice Memorandum makes it clear that the court will

allow only items specifically proven by invoices and receipts to be necessarily and reasonably incurred to preserve or protect the property. The commentary at s. 3.7 states that the mortgagee's affidavit must contain sufficient details for the court to ascertain the three requisites.

[30] The mortgagee submits that it has completed these prerequisites. The mortgagee retained an independent contractor (Veranova) to supply goods, materials and services; Veranova's invoices to the mortgagee satisfy the method for proof identified in the Practice Memorandum. The mortgagee submits that what its independent subcontractors, whether their inspectors, or when special repairs requiring skill tradesman were required, those subcontractors charge Veranova is not relevant, nor what markup the property manager adds to the invoices from their subcontractors and suppliers. The property manager resists disclosure of its arrangements or contracts with its inspectors, subcontractors and suppliers, because their disclosure may fall into the hands of competitors.

[31] In principle, it is reasonable for a mortgagee to hire a property manager to physically manage the properties it takes possession of in the course of foreclosure proceedings, and for the property manager to contract out services to independent subcontractors, include the hiring of inspectors and, when necessary, qualified professional tradesman (such as the electrician in this case).

[32] In principle, it is appropriate for the property manager to recover its reasonable costs, including a reasonable markup for administration and supervision of the work of its subcontractors, contingent upon how the contract between a mortgagee and the property manager provides for its compensation.

[33] Having accepted that, in principle, a mortgagee is entitled to contract out services to a property manager and to provide reasonable compensation to the property manager, it is still required that a mortgagee prove to the court, by affidavit evidence containing sufficient evidence, that the expenditure claimed against the mortgagor is an expenditure a mortgagee, by the wording of the mortgage, is entitled to recover; that the expenditure is necessary to preserve the property; and, that the amount of the expenditure is reasonable, both in the context of the work done and its value in protecting the property.

[34] With respect to the standard of proof in relation to the eight categories of expenditures described above, the court makes the following observations. The Court intends that these observations constitute an example of the approach the court takes to analysis in respect of similar protective disbursement claims.

Electricity/Hydro (Item 1)

[35] The actual electricity invoices are attached to the mortgage manager's affidavit and satisfy the requirement of establishing that they were actually incurred. On occasion, the quantum of electricity bills has caused this Court to look carefully at the necessity of and reasonableness of the amounts claimed. In this case, Ms. Dickson's affidavit establishes that the oil furnace had been removed by someone, and that electrical heaters had been installed by the property manager to heat the property in winter. Most of the \$2,097.12 in power bills appears to

relate to the requirement to heat the property during the winter by electricity. In this circumstances, where the residence had value that was protected by the provision of electric heat through the winter, the Plaintiff has discharged the onus or proving that the expenditure was necessary and, in this case, reasonable in amount.

The electrical heater contract (Item 2)

[36] Neither Ms. Dickson's affidavit nor Ms. Hiltz's affidavit disclosed whether one (or more) estimate(s) was obtained, and approved by the Mortgagee, for the installation of the electrical heaters. Despite this, the Court concludes, on the basis of the affidavit evidence of Ms. Dickson, that the installation of a source of heat was necessary by reason of the removal of the furnace, presumably by someone related to the mortgagor. Said differently, the Plaintiff has established the necessity of the installation of the electric heaters in this case.

[37] Ms. Hiltz stated in oral evidence that an estimate for the work would likely have been obtained before this contract was awarded. It was not in evidence. The property manager was invoiced \$1,219.00 by DKT for the work of supplying and installing the electric heaters. Based on Ms. Hiltz's oral evidence, the Court concludes that even absent an estimate being produced in evidence, it is likely that an estimate was obtained by the property manager and that an estimate was provided by the property manager to the Mortgagee (which included its markup) and approved by the Mortgagee.

[38] Ms. Dickson's affidavit establishes that the markup in this case was \$126.50. Ms. Hiltz states that the markup would have covered the property manager's overhead for obtaining estimates and a subcontractor, and for supervising its work.

[39] There is no evidence before the Court as to the particulars of the materials supplied (totalling \$780.00) and therefore the reasonableness of the biggest portion of the electrical contractor's invoice. Despite this, the Court is prepared to infer, from the totality of the evidence, that the amount paid to the electrical subcontractor was reasonable.

[40] Also, there is no evidence of the reasonableness of the property manager's markup, absent some evidence that this was, by its contract with the mortgagee, its only compensation for obtaining and supervising the work. The Court is not prepared, absent evidence about the contract between the property manager and the Plaintiff, to conclude that the addition of the markup was reasonable. If the property manager received from the Mortgagee no other compensation for its work, which has not been established, then it might be that the amount of the markup, which appears to be in the range of 10%, is not unreasonable.

Lawn Care, Snow Removal, Inspections and Occupancy Checks (Items 4, 5, 6 and 7)

[41] Arguably the provision in the mortgage that the Mortgagee must keep the property in good condition, and not allow anything to happen that lowers the value of the property, and the right of the Mortgagee, upon the Mortgagor's failure to meet his obligation, to fulfill the

Mortgagor's obligation, authorizes the Mortgagee to carry out lawn care, snow removal, inspections and occupancy checks. I infer that inspections, occupancy checks and snow removal are necessary to maintain the Mortgagee's insurance coverage in good order.

[42] The Mortgagee must still establish the reasonableness of the amount of the expenditure, both in its fairness in relation to the work done and its value in protecting the property. The reasonableness can be measured on two dimensions: first, the frequency and circumstance related to when the service was provided; and, second, the extent of the service provided on each occasion in relation to the charge or expenditure claimed. In this case, the property manager charges the Mortgagee a flat fee of \$38.00 plus HST for each attendance for lawn care and snow removal in respect of any property, and \$35.00 plus HST for each inspection and occupancy check. The amount that it paid to its contracted inspector is not before the Court. It is the contracted inspector who performed the service.

[43] On the evidence in this case, the Plaintiff has satisfied the Court that the timing and frequency of the inspections, lawn care and snow removal are reasonable.

[44] There is evidence as to what the property manager claimed from the Mortgagee (and the Mortgagee from the Mortgagor) for each attendance, but not what the property manager paid its contracted inspector who carried out and performed the service. This evidence is relevant to the issue of the reasonableness of the charge.

[45] There is no evidence from which the Court can determine if the fixed fee claimed for each attendance is reasonable, regardless of the amount of time and effort that may have been required to perform the service. There is no evidence of what was involved on the part of the contracted inspector for each of the services claimed, nor what markup was added to what the contracted inspector invoiced and was paid, or how the contract between the property manager and the Mortgagee provided that the property manager would be compensated for its administration of these services. In my view, this is evidence that should be before the Court in order for the Court to determine the reasonableness of the claim for those expenditures.

[46] In her oral evidence, Ms. Hiltz corrected para. 8 of her affidavit to indicate that the property manager billed the Mortgagee at the rate of \$30.00 per hour for work, not that the contracted inspector billed the property manager \$30.00 per hour. The Court infers that this statement is not in reference to those services which the property manager paid the contracted inspector on a fixed fee basis as opposed to a time basis, but rather only for those services which the inspector and the property manager invoiced on a time basis. The time-based charge for services appear to have included charges for cleaning the property, for providing supervised access to others, and for the conduct of ordinary repairs and maintenance.

[47] There is no basis upon which the Court can determine the reasonableness of the claimed expenditures for items charged on a fixed fee or per occasion basis without being provided evidence as to the cost of those services to the property manager.

[48] In circumstances where the property manager effectively contracts out to standing independent inspectors and material suppliers and, when necessary (and subject to approved

estimates) other specialized repairers, and it simply coordinates the work, the current rules and practices of this court require evidence of the estimates (if any), invoices and receipts of those subcontractors and suppliers providing details of the time involved, the hourly rate, and cost of materials, in order to assess the reasonableness of the amount of the expenditure.

[49] In most foreclosure actions, the largest claimed expenditure is for cleaning by the inspector (and sometimes its crew), and the second largest expenditure for substantial “repairs”, apparently carried out after estimates from qualified tradespersons. The court’s oversight of the necessity of these expenditures and the reasonableness of the charges for these services is not possible without receiving the estimates (where they exist), and the invoices of the subcontractors for their work itemized by dates, hours, and rates, and for any materials required.

Summary

[50] In respect of the circumstances of this case, the Court approves the electricity expenditures in the amount of \$2,097.12.

[51] The Court approves the amount invoiced by the electrical contractor to the property manager for the installation of the electrical heaters, \$1,219.00. The Court does not approve the markup, absent evidence of the contractual arrangement between the Mortgagee and the property manager, and, if there was no provision for compensation, some evidence as to the reasonableness of the markup.

[52] With respect to those services for which the property manager charged the Mortgagee on a fixed fee basis (lawn care, snow removal, inspections and occupancy checks), absent evidence of the work involved, the actual cost to the property manager, and reasonableness of the markup, if any, added by the property manager, those claims are not approved.

[53] With respect to the services carried out by inspectors and subcontractors for the property manager for which invoices are on a time and material basis (in some cases pursuant to estimates), absent evidence of the cost to the property manager and the terms of the contract between the property manager and the Mortgagee that establishes the reasonableness of any markups, the disbursements are not approved.

[54] The Court will issue an order approving the auctioneer’s report and the sale, approving the claim for costs, and only those expenditures specified in this decision.

Warner, J.