

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Coastal Financial Credit Union Ltd. v. Mullen,
2003 NSSC 140

Date: June 5, 2003
Docket: S.Y. No. 6444
Registry: Yarmouth

BETWEEN:

COASTAL FINANCIAL CREDIT UNION LIMITED

Plaintiff

- and -

LUKE DANIEL MULLEN and TAMMY CHURCHILL

Defendants

DECISION

HEARD BEFORE: The Honourable Justice C.E. Haliburton, J.

DATE HEARD: June 5, 2003

PLACE HEARD: Yarmouth, Nova Scotia

DECISION DATE: June 5, 2003

COUNSEL: Andrew S. Nickerson, Q.C., for the Plaintiff
Luke Daniel Mullen, not represented
Tammy Churchill, not represented
John D. Bonn for the Town of Yarmouth (intervenor)
Stephen T. McGrath for the Attorney General of Nova
Scotia (intervenor)

HALIBURTON, J: (Orally)

[1] This matter comes before the court as an application to amend the Sheriff's Report which was approved in an Order confirming the sale granted the 23rd of May, 2002.

[2] The file discloses that the Plaintiff, Coastal Financial Credit Union, foreclosed a mortgage on a commercial property mortgaged to them by Luke Daniel Mullen and Tammy Churchill, who held title as joint tenants. The Order for Foreclosure and Sale fixed the amount of the mortgage at slightly over \$275,000. The property was sold at the foreclosure sale for the amount of \$280,000 but after accounting for outstanding taxes and expenses and the cost of foreclosure the Plaintiff suffered a deficiency. Included in the expenses initially paid by the Sheriff was the sum of \$11,949.22 in taxes claimed by the Town of Yarmouth. That figure included the sum of \$1,784.65 claimed with respect to a Business Occupancy Tax owing by Luke Daniel Mullen as the occupier.

[3] Initially, the Sheriff paid over the sum claimed for occupancy tax to the Town of Yarmouth. I presume it was as a result of the objection of the Plaintiff and the decision to initiate this application that the Town reimbursed the Sheriff for that amount being the sum of \$1,784.65.

[4] The application comes before the court at this time as an application to amend the Sheriff's Report. The application is taken by the original Plaintiff. The Town of

Yarmouth and the Attorney General of Nova Scotia both appear as intervenors.

[5] Nobody has questioned the jurisdictional basis of the Court to consider this application at this stage of the proceedings, and I take it...and the subject matter is such that it's a matter that ought to be determined in any event. The essential question is whether the "occupancy tax" which was collected on this particular foreclosure sale ought to be paid over to the Town of Yarmouth; that is, whether the Town of Yarmouth had a right to receive those funds from the foreclosure sale and whether the Sheriff was under an obligation to pay them over; or whether the occupancy tax was simply a debt of the occupier of the property. The occupier, Mullen, was coincidentally one of the two owners; and whether the Town should be faced then with attempting to pursue that occupier for a simple debt which is outstanding.

[6] I want to express my appreciation to Counsel for their substantial briefs on the subject. I found them very helpful. Counsel seem to have harrowed the ground pretty thoroughly. It probably is no great surprise at this stage if I indicate that - that I am in general agreement with the propositions advanced in the brief of the Applicant, and that the Town does not have a lien on the \$1,784.65 which is the subject matter of the Application.

[7] I think the history, and - and I'm - if I had taken the time to research, I think my research would have confirmed the accuracy of my recollection of the history of these provisions. Formerly, and Mr. Nickerson suggests that it's some twenty years ago when the law changed, but formerly there was an assessment on the

“personal property” of businesses. If my recollection serves me correctly there was frequently controversy about the value of various - of the various types of personal property that business occupiers might have had. One might imagine today that there would be an effort being made to assess computers and computer programs and, as well as, inventory things like - like clothing in clothing stores and so on. All of which led to - probably led to more debate than the tax was worth.

[8] So it was determined some fifteen or twenty years ago that the best way of - or the more sensible way of assessing business occupiers was to simply levy an assessment against their personal property, as it were, equal to half the assessed value of the real property which they were, in fact, occupying. It's kind of a rough and ready rule of thumb method of assessing occupiers for the value of the - of being able to carry on their businesses at a particular location with their stock of goods or whatever. So what had previously been a personal property tax or a tax on personal property became an occupancy tax.

[9] Nonetheless, looking at the provisions of the *Act* that you gentlemen have referenced in your briefs, it appears that the Legislature continued what were essentially two separate schemes for taxation and for - and for effectively collecting those taxes that were levied. So you have on the one side personal pro... the various assessments that can apply to personal property and business occupancy, and a specific section of the *Act* creates a lien with respect to occupancy and personal property.

[10] On the other side, there is the real property assessment and the tax levied on the real property and a lien which is created on real property. There does not appear to be provided any crossover between the - the two which would enable the taxing authority, as a result of having assessed and taxed real property, to seize personal property by way of a tax lien; nor does there appear to be any provision for the taxing authority having assessed and taxed personal property or occupancy to seize real property by way of a lien.

[11] There may be - and it - it seemed to me in the brief which - which was filed by - by Mr. Bonn on behalf of the Town was considerable ... discussion of tax - of what is a tax and the creation of a tax. I think it's helpful in considering the appropriate disposition of this matter to indicate that a tax without a lien is simply a debt. It's a simple debt that has to be collected in the normal way.

[12] So in my conclusions, I am essentially considering them as two separate concepts. There may be a tax that is due and owing, but the real question is, has a lien be - been created in favor of somebody opposed to the title - opposed to the titleholder? It may be useful if anybody should ever be interested in this decision to specify that - what the circumstances are in this particular case.

[13] There is a mortgagee which is the Credit Union, Plaintiff. The mortgagee acquired what is the real title to the property at some earlier time and their title is subject only to be displaced by someone who can advance a prior claim or a superior claim. Superior claims might be created by liens. Subject to the creation

of such liens, then the Credit Union, when push comes to shove as it did in this case, has the authority to dispose of the title to the property.

[14] We also have the mortgagors, the second parties in this matter, Luke Daniel Mullen and Tammy Churchill. They were the owners. They held the equity of redemption as a result of their mortgage to the Plaintiff. They are or were joint tenants of the property, and if I haven't already said so, the parties who - subject to foreclosure - continue to have the equity of redemption or the equitable title.

[15] And then there was the occupier, which I'm told, and I take it - told correctly, was Mr. Luke Mullen operating a restaurant as a sole proprietorship. So as has been pointed out, if it were relevant and, in my view, it's not relevant or not significant in the outcome, but if it were significant in this case the occupier who has been assessed for the occupancy tax is not the same legal entity as the mortgagor.

[16] Arguably, obviously he was, as occupant, one of the joint tenants and, therefore, had a certain interest in common with the other party whose interest was being foreclosed. But that would hardly make Tammy Churchill jointly and severally liable for any taxes which might be levied as a result of Mr. Mullen's occupancy, the "occupancy tax".

[17] So, as I think I've indicated, the essence here in my considerations is not whether a tax was justly and truly owing and whether the Town had a right to collect the taxes if they could find some means to do so, but the essence of the

matter is whether or not the occupancy tax levied against one of the co-owners created a lien which could be enforced against the interest of the mortgagee.

[18] Section 128 of the - 128(2) of the *Municipal Government Act* creates the occupancy tax lien on the personal property. Section 133 of the *Act* specifically declares that the occupancy tax levied does not create a lien on the real property. Section 129(a) does create a lien on the real property for the real property tax which is levied.

[19] It seems to me that in considering the appropriate disposition of this application, it's vital to consider what is it that is being sold. Where does this fund of money come from out of which the tax is to be paid? What is being sold is the "real" title to the property? The holder of the real title in the process of foreclosing the equity of redemption places the - both the real title and the equitable title on the market in the auction, and both real and equitable title will pass to the successful bidder. Claims against the holder of the equitable title, obviously, will be enforceable only after the claim of the holder of the real title has been satisfied.

[20] The owner, who coincidentally is assessed as an occupant will have no property in the proceeds of the sale unless there is a surplus over and above the amount of money which is required to satisfy the mortgage and the other liens or encumbrances which affect the title of the mortgagee, that is the Plaintiff.

[21] I adopt the position which has been taken on the part of the Attorney General, and, indeed, I find - I found a good deal of comfort in the fact that the

Attorney General was represented to essentially endorse what appeared to be the intent of the Legislature in creating the various sections that we've been dealing with.

[22] I accept the proposition that Sections 129(a) and 131 are inconsistent, one with the other, that they can't be read conjunctively. I accept the proposition that as a result of the sale - of a Sheriff's sale, the Sheriff is liable to pay only the tax on the real property as required or as provided for in Section 129(2) of the *Act*; and I accept the Attorney General's objection to the position taken by the Town. The Town puts forth the proposition that, after a forced sale, the proceeds would be applied as if it were a "voluntary" payment on taxes. The effect of that would be to satisfy, first, the occupancy tax or other taxes assessed against the mortgagor, applied successively to the earlier taxes and then later taxes. I agree that adopting that position would eliminate any real meaning, which - or understanding of the term "lien" or the creation of a lien on the property. Effectively taxes which create liens and those which do not create liens would then be indistinguishable. And as, perhaps, was put graphically by counsel; acceding to the position of the Town would, in effect, create occupancy tax as a "super-lien" on the property being sold.

[23] I would simply add that I - I would reject the proposition that's put forward, if I haven't already done so, I certainly - have implicitly done so, the proposition that's put forward on behalf of the Town that Section 129(a) creates a lien on anything other than "the property" and that "the property" is clearly characterized in that section as real property.

[24] So for all those reasons I would allow the application, and order that the - in spite of the hardship on the taxpayers of the Town of Yarmouth, that the proceeds of the sale which have been held by the Sheriff in relation to the potential liability for occupancy tax be paid over to the Plaintiff.

MR. NICKERSON: May I speak to the issue of costs, My Lord?

THE COURT: Well, I guess I have to hear you with respect to costs, Mr. Nickerson.

MR. NICKERSON: Well, my instructions are to - if we had been successful to seek the costs in the normal event costs due follow the event. The ...

THE COURT: You don't ...

MR. NICKERSON: My ...

THE COURT: You don't pay your residential taxes in Yarmouth, do you?

MR. NICKERSON: My client is a poor struggling financial institution ...

(Laughter in courtroom)

MR. NICKERSON: ... as opposed to a wealthy governmental body with unlimited resources, and I don't - but I believe - I believe that Your Lordship should consider that issue, and we would ask that the - ask that the Credit Union be awarded some costs. I assume since my friend at the Attorney General's Department didn't oppose me I - I - there would be no - nothing going that way, but we think the Town should make some contribution to costs in the matter. They

got some value in getting a ruling out of it in any event, and - so we would ask for Your Lordship to give us a little relief there.

THE COURT: Okay; Mr. Bonn.

MR. BONN: Thank you, My Lord. I guess in the circumstances that - there was no clarity beforehand and this seems to have clarified matters. I think it's appropriate circum... circumstance for there to be no costs. I mean we had no - no guidance. I think, obviously, we do now; and it's - it's a matter that's being determined, but in the circumstances I do think it's a situation where costs would not be appropriate.

THE COURT: And Mr. McGrath, do you have anything to say about costs?

MR. McGRATH: Um ...

THE COURT: Your ox is not being gored, I guess, by Mr. Nickerson.

MR. McGRATH: I ...

THE COURT: Are you looking for costs against the Town?

MR. McGRATH: I'll leave that up to your discretion. I will point out, My Lord, that I - I think all of the parties here had - have cooperated on a - on a very high level. Certainly, the Municipality's agreement to repay the funds back to the Sheriff, I think, was helpful and probably avoided further - further harangues down the road, and - and that's all I'll say. I'll leave it to your discretion.

THE COURT: Okay; thank you.

Well, costs are always a difficult issue for me. The - the issue having been raised, had to be resolved, and it was - it was raised, I guess, through nobody's fault. It is a matter which hasn't been previously ruled

upon. I had a brief discussion with one of my - or a couple of my fellow judges interested in foreclosures and - and it was a subject of some debate amongst ourselves; but the Applicant has been successful. Taking into account the public interest in the matter and the fact that the Town really had no choice but to proceed with this matter I'm going to allow costs which I think would be probably in the range of half what would be normally expected at \$350.00 just to defray Mr. Nickerson's cost of doing that brief so that ...

MR. NICKERSON: Thank you, My Lord. I assume that I'll draft some sort of Order and circulate it to my learned friends for their perusal and review, ultimately, get it to Your Lordship. I don't know ...

THE COURT: Okay. That's - that'll be very gracious,
Mr. Nickerson.

July 3, 2003

The Honourable Justice C.E. Haliburton
Judge of the Supreme Court of Nova Scotia