

SUPREME COURT OF NOVA SCOTIA

Citation: Credit Union Atlantic Ltd. v. Isenor, 2012 NSSC 183

Date: 20120501

Docket: Hfx No. 356884

Registry: Halifax

Between: Credit Union Atlantic Limited

Plaintiff

v.

WBLI Incorporated, Trustee in Bankruptcy on behalf
of Derek Blair Isenor and Mary-Jane Isenor

Defendants

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Heard: May 1, 2012

**Oral Decision Edited
and Transcribed:** May 7, 2012

Counsel: Adam D. Crane and Shawn Smith, Articled Clerk, for
plaintiff
Mary Jane Isenor, on her own
John T. Shanks and Ian Breneman, for Enfield Hardware
Ltd.
Tiffany L. Robertson, for East Coast Kitchens

Moir J. (Orally):

[1] A sale under an order for foreclosure and sale resulted in surplus funds of \$69,982.04. The equity was owned by Derek and Mary-Jane Isenor. It is encumbered by these interests in the following order:

June 8, 2011	Builders' Lien	Kel-Greg Enterprises Limited Claiming \$5,911
June 9, 2011	Builders' Lien	Enfield Hardware Ltd. Claiming \$44,293
August 15, 2011	Builders' Lien	East Coast Kitchens Claiming \$15,000
September 23, 2011	Builders' Lien	Halifax Insulators Ltd. Claiming \$5,400
November 10, 2011	Judgment	Credit Union Atlantic Limited

November 18, 2011 Judgment Christopher Rollman

[2] In addition to these interests, the amount settled by the order for foreclosure and sale is insufficient. The mortgagee incurred protective disbursements that are due under the mortgage and chargeable against the property according to *Royal Bank of Canada v. Marjen Investments Ltd.*, [1999] N.S.J. 4 (C.A.).

[3] Surplus funds after foreclosure and sale stand in the stead of the foreclosed equity of redemption. They are to be distributed according to the priority of valid charges against the equity. So, first I will determine validity and priority. Then I will assess the amounts of each relevant charge.

[4] Mr. Isenor made an assignment in bankruptcy. It is well settled that judgments against him are eradicated and that, unlike statutory liens for preferred creditors, builders' liens are unaffected by the bankruptcy.

[5] Ms. Isenor asserts a claim to the surplus on the basis of the *Matrimonial Property Act*. There are two problems with her assertion. Firstly, the *Act* gives

only a personal right to apply for a division: *Hurst v. Gill*, 2011 NSCA 100. That was a case about a judgment. These are builders' liens that we are dealing with and the situation of a builders' lien is even stronger because of the provisions of s. 7 of the *Builders' Lien Act*. Secondly, Ms. Isenor is the judgment debtor and one of the defendants in the builders' lien actions. At the time of the sheriff's sale, their claims attached to her interest in the equity whether it arose by virtue of her joint tenancy or by virtue of some other interest.

[6] Ms. Isenor does not have a *Matrimonial Property* interest that takes priority over the Credit Union, the builders' lien holders, or the judgment creditors.

[7] The four builders' lien holders are one class and, therefore, share *pari passu*. Kel-Greg did not register a *lis pendens*. Its lien is extinguished.

[8] Halifax Insulators cannot participate in the surplus because it proved no debt.

[9] Halifax Insulators' is a small claim and I am satisfied that it chose not to participate. Also, this, as opposed to a builders' lien trial, is the appropriate forum in which to prove the claim. The lien is gone. It has been foreclosed.

[10] The priorities stand as follows:

1. Credit Union Atlantic as mortgagee
2. Unextinguished Builders' Liens *para passu*
3. One half of any balance, the trustee in bankruptcy
4. On Ms. Isenor's half, first Credit Union Atlantic as judgment creditor, then Christopher Rollman as judgment creditor, then Ms. Isenor.

[11] I will sign an order distributing the surplus first to Credit Union Atlantic for the balance of the mortgage debt plus \$2,700.74 for costs.

[12] Second, and this will exhaust the fund, to East Coast Kitchens and Enfield Hardware Ltd. *para passu*. The East Coast Kitchens share will be calculated on \$15,000 plus interest at five percent per year, plus costs. Five percent is the rate for default judgment on a liquidated demand under the Rules. At least that is what it is for now. The Enfield Hardware share will be calculated on \$44,293.40 plus interest, as contracted, of two percent per month, plus costs.

J.