SUPREME COURT OF NOVA SCOTIA
Citation: ***Xceed Mortgage Corporation v. Baker***, 2012 NSSC 221

Date: 20120612
Docket: Ken No 350561
Registry: Kentville

Between:

Xceed Mortgage Corporation *and*
Xceed Funding Corporation*, a body corporate*

Plaintiff

-and-

James A. M. Baker

Defendant

Judge:	The Honourable Justice Gregory M. Warner
Heard:	May 8, 2012 at Kentville, Nova Scotia and May 30, 2012 by recorded telephone conference call
Written Decisions:	June 12, 2012
Counsel:	**Plamen P. Petkov**, counsel for *Xceed Mortgage Corporation* and *Xceed Funding Corporation* **Rebecca L. Hiltz-LeBlanc**, counsel for *William Kennettle* **Jeremy Gay**, counsel for *R. H. MacFarland (1996) Limited*

By the Court:

[1] This decision deals with the application of the *Civil Procedure Rules* to a motion for the surplus fund from a foreclosure and sale, and the priorities to the surplus fund.

Background

[2] In December 2006, James Baker ("Baker") mortgaged a residential property to Xceed Mortgage Corporation and Xceed Funding Corporation ("Xceed").

[3] By March 1, 2011, Baker was in default. In June 2011 Xceed sued for foreclosure and sale; Baker did not file a defence. On September 28, 2011, Xceed was granted a "Foreclosure Order" approving the balance owing under the mortgage and authorizing a sheriff's sale. At the sale on March 16, 2012, the property was knocked down to William Kennettle ("Kennettle") for more than the amount owed to Xceed.

[4] On April 20, 2012, Xceed filed a motion seeking an order: confirming the sheriff's sale; taxing its legal costs; approving protective disbursements incurred after the date of the foreclosure order; and, "directing the payment of the surplus sale proceeds to the parties entitled thereto or to the Prothonotary ..." The motion was set for hearing on May 8, 2012.

[5] Xceed's counsel gave notice of its motion to the defendant Baker and the subsequent encumbrancers by registered mail on April 20, 2012.

[6] These subsequent encumbrancers, the nature of their charges, and the date of recording at the Land Registration Office, are:

I R. H. MacFarland (1996) Ltd., a Judgment recorded September 17, 2008

II Canada Revenue Agency, a Judgment recorded December 10, 2009

III William Kennettle, a Mortgage recorded February 21, 2011

IV Workers' Compensation Board ("WCB"), a Judgment recorded June 17, 2011

V Payzant Building Products Ltd., a Judgment recorded September 20, 2011

[7] Counsel for WCB wrote to the Court, with copies to all other parties, on April 30, 2012, claiming a first lien, ahead of Xceed and all encumbrancers, pursuant to Section 147 of the *Workers' Compensation Act*. By letter dated May 7, 2012, WCB withdrew its claim.

[8] Counsel for William Kennettle wrote to the Court on May 2, with copies to all parties, enclosing Affidavits of counsel and Mr. Kennettle together with a brief, claiming the entire surplus. The brief disputed WCB's claim on the basis that the real property was not used in or in connection

with or produced in or by an industry for which Baker had been assessed by WCB. Kennettle submitted that he was the only other secured creditor. By inference, he described the Judgment creditors as unsecured creditors. Counsel submitted that priority is determined on the basis of chronology ("first in time is first in right"), and equitable charges only takes over a subsequent mortgage where the mortgagee has notice of the equitable charge.

[9] At the May 8th hearing, the Court was advised that the CRA was not asserting an interest in the surplus fund. Kennettle submitted that it was entitled to the surplus. The Court directed counsel to ss. 47, 52, 65 and 66 and the definition sections of the *Land Registration Act* ("*LRA*"), and asked why the MacFarland judgment did not rank in priority to Kennettle's mortgage. The hearing was adjourned for further written submissions.

[10] On May 9th, the Court received written submissions from Kennettle making two supplementary points.

[11] First, with respect to the issue of priority of interests, he submitted that s. 66 of the *LRA* created equal priority among secured and unsecured creditors (unsecured creditors being judgment creditors) in circumstances where the judgments were recorded prior to a mortgage (in this case, the Kennettle mortgage). For this submission, he relied upon *Central Guaranteed Trust* v *Trask* [1992] NSJ No. 591, a decision of Justice Haliburton in respect of s. 20 of the *Registry Act* (replaced in 2001 by section 66 of the *LRA*). The conclusion of Justice Haliburton was that by section 20 of the *Registry Act*, in Nova Scotia unlike other jurisdictions, there is "no race to the registry", but instead creditors share *pro rata*.

[12] Kennettle's second point was premised on Xceed's Notice of Motion being a motion for surplus funds. On that premise, by application of the combination of *CPR 72.14* and *Practice Memorandum #1*, section 3.4, only Kennettle had proven his claim before the hearing of the motion; all other subsequent encumbrancers had lost their entitlement to share in the surplus by not filing proof of their claim prior to the hearing.

[13] On May 9th, the Court received a letter from counsel for MacFarland explaining why MacFarland had not received in a timely manner the Notice sent by Xceed and had received Kennettle's submissions of May 2nd so recently that it was not in a position to participate in the May 8th hearing. MacFarland asked for permission to file an Affidavit and make submissions. Counsel for Kennettle replied that it was too late.

[14] The Court allowed MacFarland to file an Affidavit, and both parties to make further submissions on both procedure to seek, and priorities on, the surplus fund. MacFarland's Affidavit and submissions, together with further submissions from Kennettle were received on May 23rd and 25th respectively.

[15] On May 31st, a hearing by teleconference was held, pursuant to *CPR 25.04*.

Issue #1 The Procedure to Obtain the Surplus Fund

[16] *CPR 72.14* reads as follows:

> **Surplus**
>
> **72.14 (1)** A mortgagee who is paid in full out of the proceeds of sale under an order for foreclosure, sale, and possession must, if there is a balance remaining, notify subsequent encumbrancers or other parties of the amount of the surplus fund.
>
> **(2)** A subsequent encumbrancer or other party must be notified of the surplus fund in either of the following ways, unless there is a designated address for delivery or a judge orders otherwise:
>
> (a) by sending the notice by registered mail to the last known address of the encumbrancer or party;
>
> (b) in the same way as a party is notified of a proceeding made under Rule 31 - Notice, as if the notice were an originating document.
>
> **(3)** A subsequent encumbrancer or other party may make a motion for payment of the surplus fund.
>
> **(4)** A judge may take accounts, make inquiries, tax costs, and order distribution of the surplus.

[17] *Practice Memorandum #1*, s. 3.4, reads as follows:

> 3.4 **Claim for Surplus**
>
> (a) Each subsequent encumbrancer intending to make a claim to all or any part of the surplus is required, in advance of the motion, to file an affidavit in proof of its claim.
>
> (b) The Court will order distribution of the surplus to encumbrancers according to their priorities.

[18] Kennettle submitted that Xceed's motion of April 20 was a motion for payment of part of the surplus fund and the failure of MacFarland to prove its claim by filing an affidavit before the May 8th hearing precludes it from claiming the surplus.

[19] Kennettle submitted that Xceed's claim for its costs and protective disbursements were a claim upon the surplus fund. When directed to the phrase in CPR 72.14(3) that "... a subsequent encumbrancer or other party ..." is entitled to make a motion for surplus funds, Kennettle argued that Xceed was an "other party" for the purpose of its claim for amounts incurred subsequent to the date of the foreclosure order.

[20] I do not agree with this analysis. Xceed's claim for its costs and protective disbursements incurred after the foreclosure order is not a claim against the surplus fund. It is a claim arising under the foreclosed mortgage, and is a claim secured by that mortgage. It is a claim of Xceed as the mortgagee; it is not a claim as an "other party" or arising from an interest created other than from the foreclosed mortgage. A surplus only arises when a mortgagee has been paid in full. *CPR 72.14(1)* describes the amount of the surplus fund as the balance remaining after "... a mortgagee who is paid in full out of the proceeds of the sale under an Order for Foreclosure, Sale and Possession."

[21] A claim for the surplus fund may be made, pursuant to *CPR 72.14(3)*, by a subsequent encumbrancer or other party. Without restricting who may constitute an "other party", the defendant is often, as the holder of the equity redemption, the other party making the motion. If Xceed had lent other monies under another recorded document, or acquired another recorded interest in the property or against the defendant, it may have a claim as a subsequent encumbrancer. But, on the facts of this case, Xceed's interest is only as mortgagee of the foreclosed mortgage.

[22] Xceed had no involvement in the surplus fund, other than:

a) to notify subsequent encumbrancers and others who may wish to make a claim on the fund; and,

B) to pay the surplus fund as directed by the Court, either to the Prothonotary at Halifax or to a subsequent encumbrancer or other party who files a motion and for whom an order is granted.

[23] I do not interpret Xceed's motion of April 20th as a motion by an "other party" or for payment out of the surplus fund.

[24] To date, no motion for payment out of the surplus fund has been filed by a subsequent encumbrancer or other party.

[25] There is nothing to prevent a subsequent encumbrancer or other party from filing a motion returnable on the same day as the mortgagee's motion (and in my experience this often occurs) for payment of or out of the surplus fund. To make such a motion, the party must comply with the minimum notice requirements under the *Civil Procedure Rule*.

[26] If I am wrong on this point, and Xceed's Notice of Motion is a claim for a share in the surplus fund, the motion was not concluded on May 8th, but adjourned for further submissions. No order of distribution of the surplus had been made before MacFarland wrote to the Court for permission to file its Affidavit and make its submissions. Before the Court made its determination or concluded the adjourned hearing, MacFarland had filed an Affidavit proving that its judgment remained outstanding.

[27] The *Rules* are intended to promote just, speedy and inexpensive determination of issues, and are not intended to be a law unto themselves. *CPR 2* gives the Court the discretion to excuse compliance, and extend a notice period where it is in the interests of justice to do so. If I am wrong,

justice mandates that the Court hear from MacFarland in the circumstances of this case, where the proceeding had not concluded or resulted in a decision when MacFarland asked to be heard. It was not too late for further claims for payment out of the surplus fund.

Issue #2 - Priorities on the Surplus Fund

[28] The order in which the subsequent encumbrancers recorded their charges pursuant to the *Land Registration Act* is set out in § 6 of this decision.

[29] In its first brief, Kennettle submitted that he was the only secured creditor and that the common law principle of "first in time, first in right" applies.

[30] In his subsequent submissions, he argued that there is no race to the registry (*Guarantee Central Trust* v *Trask*) and that all subsequent encumbrancers share *pro rata* in the surplus fund. Kennettle acknowledged that the *Bankruptcy and Insolvency Act* ("*BIA*")is not relevant to this matrix and does not apply to this analysis.

[31] MacFarland argued that "first in time, first in right" does apply, and submitted that *Guarantee Central Trust* v *Trask* was wrongly decided. Counsel directed the Court to § 12 in that decision where the learned chambers judge stated:

> Depending on the time of registration, one judgment creditor may have priority over a first mortgage, who, in turn, has priority over subsequent judgment holders. Because of the intervening mortgage, all the judgment holders do not have the same rights. Although the judgment holders may be creditors of equal degree, what will be immediately clear is that on a foreclosure sale by the first mortgage, the first judgment will be paid out ahead of the mortgage and the subsequent judgments will be paid only if there is a surplus.

[32] MacFarland argued, despite later statements that subsequent encumbrancers take *pro rata*, that paragraph is an acknowledgement that the principle of "first in time, first in right" applied to the determination of priority under the *Registry Act*, and, by the same analysis, should apply under the *Land Registration Act*.

[33] The *LRA* includes these provisions:

> 3 (1) In this Act, ...
>
> (g) "interest" means any estate or right in, over or under land recognized under law ... ;
>
> (r) "record" means to secure priority of enforcement for an interest by means of entries in a register pursuant to this *Act*;
>
> 47 (1) An interest in any parcel this is subject to this *Act* may be recorded. ...
>
> 52 (2) A mortgage has priority over subsequent recorded interests to the extent of the

obligations secured and the sums actual advanced under the mortgage, ...

65 (1) A registrar shall establish a judgment roll for the registration district.

(2) A judgment creditor may record a judgment for the recovery of money in the judgment roll for a registration district.

(4) A judgment recorded in a judgment roll binds and is a charge upon any registered interests of the judgment debtor within the registration district, whether acquired before or after the judgment is recorded, from the date the judgment is recorded until the judgment is removed form the roll.

66 (1) A judgment is a charge as effectually and to the same extent as a recorded mortgage upon the interest of the judgment debtor in the amount of the judgment.

[34] I agree that *LRA* section 66(1) has the same effect as s. 20 of the former *Registry Act*. I do not agree with Kennettle's submission that the effect of s. 66(1) is to create an equal entitlement to share *pro rata* amongst all creditors, including subsequent mortgagees, in circumstances where judgments are recorded prior to the recording of the subsequent mortgage; said differently, all subsequent encumbrancers become creditors of an equal class and therefore entitled to share in the surplus fund on a *pro rata* basis.

[35] In my view, common law principle of "first in time, first in right" applied under the *Registry Act* regime, and continues to apply under the *Land Registration Act* regime. A judgment creditor who records his judgment pursuant to the *LRA* has a charge as effectually and to the same extent as a recorded mortgagee upon the interest of the judgment debtor in the equity of redemption, and is entitled to priority in accord with the date of recording of the charge, in the same manner as a mortgage.

[36] Under the *BIA*, the order of priorities differs. Except when the *BIA* overtakes the *LRA* (which is not the matrix in this case), a recorded judgment becomes a charge upon the interest of the debtor from the date of recording as effectually and to the same extent as recorded mortgage. The distinction between a secured and unsecured creditor disappears.

[37] In the same manner that a first mortgagee has a charge on the debtor's interest in the property in priority to a second mortgagee, and a second mortgagee has a similar priority on the debtor's interest in the property to a third mortgagee, so too the holder of a recorded judgment has a charge on the interest of the debtor in the property in priority to any subsequently recorded interest, including a mortgage.

[38] I do not understand or agree with the analysis in *Central Guarantee Trust* v *Trask*.

[39] On one hand at §§ 12 to 14, the Court acknowledged that a recorded judgment may have priority ("acquire, in some sense, the status of a secured claim") over a first, but subsequently recorded, mortgage, which in turn has priority over subsequent recorded judgments. On the other hand, beginning at § 27, the Court described the issue of priorities as "whether one unsecured creditor can effectively gain priority over other creditors by registering a judgment in the land registry before

competing creditors do so." The Court decided that in Nova Scotia there is no race to the registry and no priority to a judgment recorded "first in time", but subsequent to the mortgage being foreclosed.

[40] I agree with Justice Moir's statement of the law in *Credit Union Atlantic Ltd* v *Isenor*, 2012 NSSC 183, § 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.

[41] A helpful analysis is contained in the text by **Joseph E. Roach**, *The Canadian Law of Mortgages, Second Edition* (Markham, Ont: LexisNexis, 2010), ch. 15.

[42] The registry system was introduced in Nova Scotia in 1752. Its main characteristics were described by Chief Justice Laskin in *AVG Management Science Ltd* v *Barwell Developments Ltd* [1979] 2 SCR 43:

> The *Acts* in the Atlantic Provinces require the keeping of public registers of deeds and documents (including plans) and provide, generally, for priority according to the order or time of registration. ... The deeds and documents that are registered are not thereby invested with any greater legal force than they intrinsically possess; there is, in short, no public guarantee of title as under the Torrens system, but if they have intrinsic legal force their registration gives them priority over unregistered instruments, of which they had no notice.

[43] That, and the view of Joseph Roach, that, subject to actual or constructive notice of a prior unrecorded interest, the time of registration determines the priority of an interest in property, is and has always been the law in Nova Scotia. The common law principle "first in time, first in right" continued under the registry system.

[44] The reform of the Nova Scotia title registration system, effected by the *Land Registration Act*, did not constitute a complete conversion to the Torrens system, the key characteristic of which is that the register is the only evidence of title. Flawed or messy titles can still be registered. However, subject to issues of fraud and of actual notice of unrecorded interests, which are not part of the matrix in this case, the priorities in respect of interests in land, and surplus funds from a foreclosure sale that stand in the place of the debtor's interest in land, have not changed. Section 66 of the *LRA* mirrors s. 20 of the former *Registry Act*: First in time is still first in right.

Conclusion

[45] No motion for the payment of the surplus fund was filed in this proceeding. If one is filed, an order will issue in accord with this decision. If I am wrong in the sense that Xceed's motion is a motion for the payment of the surplus fund, that motion had not been concluded and MacFarland is not precluded from proving its claim and arguing priorities.

[46] Section 66 of the *LRA*, as s. 20 of the *Registry Act* before it, confirms that subject to fraud and actual notice of unrecorded interests, the priority in respect of interests in land remains "first in time is first in right". Subsequent encumbrancers do not share *pro rata* in the surplus fund.

[47] I will receive written submissions on costs, if the parties are unable to agree.

J.