

SUPREME COURT OF NOVA SCOTIA

Citation: Xceed Mortgage Corporation v. Jesty, 2013 NSSC 385

Date: 20131129

Docket: Ken No. 383099

Registry: Kentville

Between:

Xceed Mortgage Corporation and
Xceed Funding Corporation, a body corporate

Plaintiffs
(Defendants by Counterclaim)

v.

Albert Jesty

Defendant
(Plaintiff by Counterclaim)

Judge: The Honourable Justice Michael J. Wood

Heard: November 22, 2013, in Kentville, Nova Scotia

Written Decision: November 29, 2013

Counsel: Andrew N. Montgomery and Lisa M. Wight, for the
plaintiffs and defendants by counterclaim
Albert Jesty, self-represented defendant and plaintiff by
counterclaim

By the Court:

[1] In February, 2012, Xceed Mortgage Corporation and Xceed Funding Corporation (“Xceed”) commenced proceedings against Albert Jesty of Sydney Mines, Nova Scotia, seeking foreclosure and sale of a mortgage dated November 17, 2006. Mr. Jesty defended the proceeding by filing a notice of defence in March, 2012. In September, 2013, Mr. Jesty amended his defence to include a counterclaim against Xceed.

[2] On November 22, 2013, a one day trial was held in Kentville, Nova Scotia. Xceed was represented by Andrew Montgomery and Lisa Wight. Mr. Jesty represented himself. This is my decision following that trial.

BACKGROUND

[3] In the fall of 2006, Mr. Jesty was looking to refinance his home in Sydney Mines. Mr. Jesty was in the trucking business and had purchased two new trucks earlier that year on conditional sales contracts. He was in arrears under those contracts and wanted the refinancing to generate a surplus which could be applied against those debts.

[4] Mr. Jesty applied for mortgage financing through a mortgage broker in Cape Breton. He provided information concerning his assets and liabilities and his home was appraised. Xceed ultimately approved a mortgage in the amount of \$126,042.44. It was a condition of the financing that the first and second mortgage be paid out, as well as debts to Honda Finance Inc., Canadian Tire Mastercard, WFF Corp. Canada and two debts to Chrysler Financial.

[5] Xceed required that the transaction include title insurance through a firm known as Titleplus. In order to do so, the transaction would have to be completed by a lawyer who had previously been approved by Titleplus. Mr. Jesty was given the names of three lawyers in Sydney who had this approval and he selected one to complete the transaction on his behalf.

[6] As part of the process for the advance of funds under the mortgage, Xceed obtained an undertaking from the lawyer to pay out the specified debts of Mr. Jesty from the mortgage advance.

[7] On November 17, 2006, Xceed wired the sum of \$121,922.30 to the lawyer's trust account. This represented the full amount of the mortgage advance after deduction of various fees and accrued interest.

[8] From the amount advanced, the lawyer paid the debts which he had undertaken to satisfy, as well as outstanding amounts for water and taxes owed to the Municipality. He also satisfied two prior judgments, the largest of which was \$11,554.32 in favour of the Minister of Finance representing a Worker's Compensation Board assessment. The lawyer paid his legal fees and some, but not all, of the disbursements incurred for the transaction. The net result of these payments was that there was no surplus for Mr. Jesty to apply to the arrears on his two trucks.

[9] Mr. Jesty testified that he was not aware that there would be no surplus funds until the day of closing. As a result of his lack of funds, the trucks were repossessed.

[10] The mortgage approved by Xceed and signed by Mr. Jesty was for a term of five years. It was to mature on December 1, 2011. During the five year term of the mortgage, Mr. Jesty fell into arrears on several occasions. His account was referred for legal action on three different occasions. Although Mr. Jesty was not in default as of the mortgage maturity, Xceed did not renew the mortgage and demanded payment in full by letter dated January 9, 2012.

POSITIONS OF THE PARTIES

Xceed Mortgage Corporation and Xceed Funding Corporation

[11] The position of Xceed is simply that Mr. Jesty's mortgage matured at the end of its term and was not renewed. As a result of Mr. Jesty's failure to pay the mortgage debt, it is entitled to an order of foreclosure, sale and possession.

Albert Jesty

[12] The position of Mr. Jesty in his defence and counterclaim is that the sole purpose of the refinancing transaction was to generate money so that he could

avoid losing his trucks. When there was no surplus generated, he was not able to do so. When he lost his trucks, he was deprived of a source of income which gives rise to a claim for damages as set out in the counterclaim.

[13] Mr. Jesty argues that the lawyer did not pay out all of the debts which were required and that some of the money which was supposedly paid to Chrysler Finance cannot be accounted for. He says that Xceed is liable for the actions of the lawyer.

[14] Mr. Jesty also says that he did not receive notification that the mortgage was maturing.

[15] Mr. Jesty testified about his financial difficulties and subsequent bankruptcy which he attributes to the failure of Xceed to live up to the terms of the mortgage agreement. He alleges that Xceed's conduct has caused unnecessary stress and hardship to him and his family.

ANALYSIS

[16] Mr. Jesty's primary complaints relate to the actions of the lawyer in processing the mortgage transaction. He acknowledges that Xceed advanced the agreed funds and acknowledges that he signed the mortgage. Mr. Jesty has complained to the Nova Scotia Barristers' Society concerning the lawyer's conduct.

[17] Mr. Jesty's theory is that some of the approximately \$17,000.00 paid by the lawyer to Chrysler Financial is missing in the sense that it was not applied to the accounts of he or his wife. He provided no admissible evidence to substantiate that allegation. He did make reference to a number of phone calls he had with people from Chrysler Financial, although that was hearsay and should not be admitted for the truth of its contents. Even if these calls were admitted, I do not believe that Mr. Jesty has provided enough evidence to prove the allegation of missing funds.

[18] Mr. Jesty also suggested that the lawyer did not pay the full amount of the Wells Fargo debt, which was secured by a second mortgage. He provided a printout from Property On-line which showed that this mortgage was not released

as of May, 2012. I am advised by Mr. Montgomery that a release has now been recorded. There was no evidence to explain why there was a delay in recording the release of the second mortgage. I do not know whether additional money had to be paid to Wells Fargo to obtain the release and, if so, who made that payment. Mr. Jesty never testified that he was required to do so.

[19] If Mr. Jesty is correct and there was a shortfall in the payment to Wells Fargo in November, 2006, then there should have been a reduction in payment on one of the other debts in order to retire the second mortgage and close the transaction. This reallocation of money would not have freed up any money from the mortgage advance for him.

[20] It is clear to me from the evidence that because of prior judgments against Mr. Jesty, any potential surplus from the Xceed mortgage was eliminated. Depending upon the situation with the second mortgage, there may not have been sufficient money to close the transaction in light of the existing encumbrances, although I have no evidence which would lead me to that finding.

[21] I am not satisfied that the lack of surplus funds available to Mr. Jesty is in any way the responsibility of Xceed. They were never advised by Mr. Jesty of the Worker's Compensation Board debt or the other judgments which had to be paid. Whatever Mr. Jesty's complaints are with respect to his dealings with the lawyer, I do not see how they could amount to a defence to an action on the mortgage where he acknowledges the advance of funds and execution of the document. The mere fact that Xceed required title insurance for the mortgage and the title insurer had a list of approved lawyers does not make those lawyers agents of Xceed.

[22] I am satisfied that Mr. Jesty has not established an evidentiary or legal basis for his defence and counterclaim. I will, therefore, grant judgment in favour of Xceed.

CONCLUSION

[23] During oral submissions, Mr. Montgomery proposed that if I found in favour of Xceed, the precise quantification of their claim and the terms of the order of foreclosure, sale and possession should take place in the same fashion as if there was a default of defence. In other words, Xceed would be required to file

the usual affidavits and supporting documents required by *Civil Procedure Rule* 72 and Practice Memorandum No. 1 for uncontested foreclosures. I believe that that makes sense in the circumstances.

[24] In order to accomplish this, I think the appropriate order would be for me to strike out Mr. Jesty's defence and counterclaim which would permit Xceed to proceed by way of default, and I will so order.

[25] There are two additional issues which I intend to deal with. The first is the question of costs of the trial. I do not think that it is appropriate for the judge who deals with the order of foreclosure, sale and possession to quantify the trial costs. It should be done by me and I will do so. The parties are to make their submissions on costs in writing. Xceed's submissions must be filed with the court on or before January 3, 2014 and Mr. Jesty's by January 24, 2014. Once I receive these submissions, I will provide my written decision on costs.

[26] The other issue raised by Mr. Jesty is the accruing interest. Under the terms of the mortgage, the applicable rate is 9.5% which is significant in this economic climate. The litigation was started in February, 2012 and the plaintiff made an unsuccessful summary judgment motion in June, 2012. The matter sat dormant for approximately a year until it came back to life a few months ago. In the circumstances, I think it is unfair that Mr. Jesty should bear the burden of accruing interest for the entire time since February of 2012. I would, therefore, reduce the time period over which interest is recoverable by fourteen months. This will not affect the discretion of the judge assessing the amount of any deficiency judgment to make any further adjustments to interest if they determine that there has been further delay on the part of the plaintiff.

[27] As the successful party, I would direct that Mr. Montgomery, on behalf of Xceed, prepare the appropriate form of order and sent it to me, with a copy to Mr. Jesty. Mr. Jesty will have ten days to make written submissions if he feels the form of order is not appropriate.

