

SUPREME COURT OF NOVA SCOTIA

Citation: Xceed Mortgage Corporation v. Jesty, 2014 NSSC 51

Date: 20140207

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

**Final Written
Submissions:** January 2, 2014 (Re Costs)

Written Decision: February 07, 2014 (Re Costs)

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] On November 29, 2013, I issued a decision following a one day trial which is reported at 2013 NSSC 385 and invited the parties to make written submissions on the issue of costs. The plaintiffs filed their brief on January 2, 2014. The defendant was given until January 24, 2014, but has not provided any submissions.

[2] The plaintiff is seeking solicitor and client costs for the entire proceeding beginning in April, 2012, which was shortly before it initiated a summary judgment motion which was ultimately unsuccessful. The amount claimed consists of fees of \$22,426.26, plus HST of \$3,363.94, together with disbursements of \$2,062.36 and HST of \$300.26, for a total of \$28,152.82. In support of their position, the plaintiffs rely on the decision in *Canada Trustco Mortgage Company v. Homburg*, 1999 CanLII 1120 (NSSC).

[3] In the *Canada Trustco* case, the plaintiff had commenced foreclosure proceedings and succeeded in obtaining an order of foreclosure and sale as a result of a summary judgment motion. Prior to the sale of the property, the mortgagor paid out the mortgage; however, the parties disagreed on whether the plaintiff was entitled to claim the actual legal expenses of the foreclosure action. The plaintiff relied on a provision in the mortgage that permitted it to recover all costs and charges (including solicitor and client costs) incurred in attempting to enforce the mortgage. The conclusion of the Court with respect to the issue is set out at pp. 16-17:

In my view, the law in Nova Scotia is that where a mortgage stipulates the mortgagor pays to the mortgagee costs on a solicitor and client basis, costs should be awarded on that basis except in special circumstances. The court has an overall discretion as to costs, but that discretion should not deprive the parties to that which they have agreed, except when those special circumstances exist.

What are the “special circumstances”? They are situations where the mortgagee uses oppressive or vexatious conduct. They are situations which include the mortgagee causing vexatious delays or unnecessary costs. To quote the Ontario Court of Appeal, they render “the imposition of solicitor and client costs unfairly or unduly onerous in the particular circumstances”. In my opinion, it should be recognized the mortgagor has no control over the quantum of costs and the court should be cautious in the amount it taxes against the mortgagor

because of this lack of control notwithstanding that which may be viewed as an appropriate amount as between the mortgagee and its solicitor.

[4] In a subsequent decision (1999 CanLII 1978), the Court assessed the appropriate amount of costs and reduced the solicitor and client account from \$69,515.00 to \$40,000.00. In doing so, the Court considered the complexity of the issues, the number of legal staff whose services were included in the account and the time spent on various tasks. The Court concluded that the amount sought by the mortgagor was markedly excessive and it would be unduly onerous for the mortgagee to have to pay the account in full. This was sufficient to give rise to special circumstances justifying departure from complete indemnity for solicitor and client costs. Ultimately the Court assessed what would be a reasonable fee to be paid by the mortgagee for the legal services performed by the lawyers for the plaintiff.

[5] In this case, the mortgage of Xceed Mortgage Corporation includes the following clause:

11. **Rights on Default:** And in the event of default being made as aforesaid, the Mortgagee shall also be entitled to send an inspector or agent to inspect and report upon the value, state and condition of the Mortgaged Premises and a solicitor to examine and report upon the title the same at the Mortgagor's expense, and all expenses incurred in so doing, together with all costs and charges (including solicitor and client costs) which the Mortgagee may incur or pay in collecting or attempting to collect any monies payable hereunder or enforcing or attempting to enforce any of the remedies and powers herein contained for the recovery of the monies hereby secured, or any part hereof, whether the proceedings taken prove abortive or not, and in recovering and attempting to procure possession of and keeping possession of the Mortgaged Premises or any part thereof, shall form and be a charge upon the said Mortgaged Premises, and be payable forthwith to the Mortgagee by the Mortgagor, and shall bear interest at the rate aforesaid computed from the time of payment of the same as upon principal money advanced upon the security of this Mortgage.

[6] As will be apparent from my earlier decision, this was a relatively straightforward foreclosure proceeding. Mr. Jesty filed a defence and alleged a number of deficiencies in the manner in which the funding of the mortgage took place. After a one day trial, I concluded that Mr. Jesty's complaints did not amount to a defence to the mortgage action. The only pre-trial procedure was the

plaintiffs' unsuccessful summary judgment motion. There were no discovery examinations.

[7] In considering the proceeding and the issues involved, it appears to me that requiring Mr. Jesty to pay approximately \$28,000.00 in fees, disbursements and taxes would be excessive and onerous. In reviewing the detailed account provided by counsel for Xceed, it includes all of the work associated with the unsuccessful summary judgment motion, as well as regular status reports to the client. There were charges for interoffice meetings to review various issues, some of which (such as Mr. Jesty's bankruptcy status) had little to do with the issues for trial. There were also charges related to Xceed's request to call a witness at trial who was not included on their initial witness list, which ultimately required a pre-trial hearing.

[8] In my view, clause 11 of the mortgage permitting the recovery of solicitor and client costs should be limited to the reasonable expenses incurred in the litigation. It should not cover work done on the unsuccessful summary judgment motion or the request to add a witness who should have been on the initial witness list. It would be unduly onerous to expect Mr. Jesty to pay such costs. Similarly, expenses incurred in reporting regularly to the client and interoffice consultations should not be recoverable as costs of enforcing the mortgage security.

[9] I believe there are special circumstances as contemplated in the *Canada Trustco* decision which would justify departure from the full amount of solicitor and client costs claimed by Xceed. Having reviewed the detailed account entries, I believe that the portion of the legal costs which should be paid by Mr. Jesty is \$14,000.00, together with HST of \$2,100.00.

[10] With respect to disbursements, I would disallow the amounts for PPSA filing fees, fax charges, filing fees for the summary judgment motion, service expenses for the summary judgment motion and the cost of the telephone conference hearing to add a witness to the witness list.

[11] There were significant courier and photocopying expenses included in the disbursements. Such items fall within the scope of recoverable disbursements; however, only as they relate to materials sent to the court or the order side. Couriers and copies for documents sent to the client or for internal use are

normally not recoverable. Although it is possible to identify some of the deliveries as going to Mr. Jesty because of the date of the invoice, it is not clear from the others where the material was being sent.

[12] With respect to photocopies, the amount claimed is \$1,217.10, but no cost per copy is identified. Nor is there any indication that there has been a discount for internal and client use. Any copies associated with the unsuccessful summary judgment motion should not be paid by Mr. Jesty. In the absence of much supporting information, I will award a lump sum to compensate the plaintiffs for all recoverable disbursements in the amount of \$350.00, plus HST of \$52.50.

[13] As an alternative to their claim for solicitor and client costs pursuant to the mortgage, the plaintiffs suggested party and party costs in accordance with Tariff A of \$16,750.00, plus \$2,000.00 for one day of trial. In my view, this matter was extremely simple with minimal complexity. There were no discovery examinations and a one day trial. In assessing the “amount involved” for tariff purposes I would not simply use the amount of the mortgage debt, although that is obviously a factor to be considered. For purposes of the tariff, I would fix the amount involved at less than \$90,000.00 which would generate costs under the tariff of \$9,750.00, plus \$2,000.00 for one day of trial. In recognition of the plaintiff’s contractual entitlement to solicitor and client costs, I will award the higher amount of \$14,000.00, plus HST which I have assessed as being the appropriate portion of the plaintiffs’ actual expenses to be paid by the defendant.

[14] In summary, the plaintiffs are entitled to trial costs of \$14,000.00, plus HST of \$2,100.00, for a total of \$16,100.00 together with disbursements of \$350.00, plus HST of \$52.50, for a total of \$402.50.

Wood, J.